Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 491.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof, Appellants, AGAINST SAMUEL PINE and FREDERICK MULLER, Appellees.	On writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit.

PETITION OF APPELLEES FOR REHEARING.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Samuel Pine and Frederick Muller, appellees in this case, respectfully petition for a rehearing by this Court, to the end that the point of laches or estoppel upon which the Court has rendered a decision in this case may be argued in this court, and that the decision heretofore rendered may be reconsidered after such hearing to such end as to the Court shall seem just.

The petitioners concede that an application for a rehearing in the case of a unanimous decision is unusual, and would not recommend itself to favorable consideration were it not for what seems to us the ob-

vious irreconcilability between the facts in the record and the decision, and for the fact that the decision is based wholly on a point, knowledge of all grounds for which was disclaimed by the counsel for the appellant at the bar of this court, and which point was not discussed in the oral arguments or briefs of counsel for either party, so that the property of these petitioners is in effect taken away from them on grounds concerning which their counsel have not been heard.

The case, as decided, involves the question of the extent to which the constitutional guaranty against the taking of property without due process of law may be lost by laches or estoppel. It also involves the interstate question as to whether the public corporations or municipalities of one State in relation to the citizens of other States and their property are or are not public corporations. The case, therefore, involves a constitutional question.

The effect of the decision is to deprive the appellees of their property and to vest it in the appellant, the City of New York, which has seized the same without authority of law—subject only to an award of damages which must be proven under technical rules of law and in respect to a species of property obviously most difficult of valuation; and all this in face of the fact that the appellees demand the return of their property and that the same exists within the jurisdiction of the Court in a condition to be returned.

The suit was brought by complainants as riparian owners on the Byram River in Connecticut to restrain the City from diverting the west branch of that river by means of a dam three miles above under erection by the City in the State of New York near the boundary line between that State and Connecticut. The bill was filed two years after the City commenced work on the dam, at which time the City alleges in its answer the dam was nowhere near completion. The bill was filed one year before actual diversion, and only on information and belief

that such diversion was intended. On these points the pleadings and testimony show an entire agreement between the parties.

The grounds on which this Court has denied to the appellees the protection of their constitutional guaranty are that they are guilty of laches or subject to estoppel. The reasons for such finding are, first, that the bill was not filed until two years after the City began the construction of the dam; secondly, that there had been negotiations between the parties to the action.

The facts by the record are that the cause of action was not the building of the dam or the use thereof for lawful purposes. The City for many years, according to the testimony, had owned and maintained other structures, including another dam in the immediate neighborhood and on the same river, but had not used the same for unlawful diversion. The cause of action in this case was the threatened unlawful use of this particular dam for the purpose of taking all the water. As to the negotiations, the testimony shows that all negotiations *prior to the filing of the bill* were negotiations of sale and price conducted on notice by complainants' attorney to the city officials that complainants denied all power in the City to coerce them or to take their property in any way save by purchase at a price acceptable to them, and on further notice to and understanding by the City that the complainants relied on the remedy of injunction in the Federal Courts for their ultimate protection.

As to the negotiations after the filing of the bill, even conceding they were based on any theory of settlement or compromise, or of reasonable compensation, it is inconceivable that they could afford any ground for laches or estoppel, *for the bill was filed.* Furthermore, the negotiations after the filing of the bill were conducted under a stipulation appearing in the record that nothing that complainants' attorney stated should be taken against his cli ents in the event of litigation. Yet this Court has

found laches because of the "two years" and estoppel because of the negotiations.

THE CITY, FROM THE BEGINNING OF THE CONTROVERSY, UPON ITS OWN KNOWLEDGE OF THE FACTS AND UPON THE PLAIN RECORD OF THIS CASE, HAS IN EQUITY AND GOOD CONSCIENCE CONCEDED THAT GROUNDS FOR LACHES OR ESTOPPEL DO NOT EXIST IN THE CASE.

Thus, former Corporation Counsel Scott, when he drew the City's answer, refrained from making any claim of laches or estoppel, and even alleged that the dam complained of was nowhere near completion (see Record, fol. 16).

During the progress of the litigation the City officials, in their discussion of the case with complainants' counsel, never questioned but that the complainants had been prompt, energetic and persistent in their assertion and defense of their rights, and neither neglect, delay or indirection of any kind was ever formally or informally charged against the complainants.

Corporation Counsel Whalen, who succeeded Mr. Scott in 1898, was represented in the conduct of this case by his assistant Mr. Sterling. Mr. Sterling argued the case for the City in the United States Circuit Court of Appeals, and knowing all the facts, after a full and most careful discussion in his brief and in his oral argument of the testimony and the record, made no claim of any grounds on which laches or estoppel could be based.

In or about December, 1901, the City's petition for a writ of *certiorari*, and its brief thereon, prepared by Mr. Whalen and Mr. Sterling, were filed in this Court. The petition thus summarizes the issues between the parties (see Petition, p. 7):

> "The City of New York is now, or in the
> "near future will be, in great need of an ad-
> "ditional supply of water, which it can get
> "only from certain streams. Several of

"these streams, however, although having "their origin in the State of New York, "eventually flow into other States, and if "citizens of those States can enjoin the di- "version of water from those streams, and "can in no manner be compelled to accept "compensation in damages, it would be im- "possible for the City of New York to make "use thereof. It thus becomes of great im- "portance to the City of New York that the "law shall be settled upon this question, and "upon the determination of this general law, "as I am informed and verily believe, de- "pends the policy that shall be adopted by "the said City in reference to its future water "supply."

The brief in this Court on said petition contains the following statement: "The matters involved are "of great importance to the City of New York and "its citizens because of their bearing upon other "projects for procuring an additional water supply. "If the opinion of the majority of the Court below "is correct, the City of New York is greatly re- "stricted as to its sources of water supply, and some "of the most available cannot be made use of be- "cause the streams flow into other States, and under "the principles of the decision below an injunction "would immediately lie to restrain such use."

"The vital questions in this case are novel ones. "It was conceded by counsel for both parties below "that no adjudication could be found that, if fol- "lowed as a precedent, was clearly decisive of the "present case. There is now pending, we are in- "formed, in this Court a suit between the States of "Colorado and Kansas, involving very similar ques- "tions to the ones now under consideration, and the "petitioners respectfully submit that this Court "should take into consideration their case as being "involved with or as a phase of the questions in "litigation in the Colorado and Kansas dispute."

It is well known to this Court that no question of laches or estoppel was involved with or was a phase of the questions in Colorado *v.* Kansas.

On or about the 1st day of January, 1902, Hon. George L. Rives succeeded Mr. Whalen as Corporation Counsel. In his brief filed for argument in this Court, Mr. Rives, after an exhaustive examination of the facts and the record, refrained from any claim of the existence of grounds for laches or estoppel.

After the argument in this Court the counsel for the appellees filed an additional brief devoted to a further consideration of the right to the flow of a non-navigable stream as a corporal hereditament or real estate. The City's counsel filed in reply a memorandum in which he again refrained from any reference to the question of laches or estoppel, and on page 3 thereof, under the statement "We recapitulate our argument as follows," gives the resumé of his argument, in which no reference is made to that question.

Petitioners therefore submit, that at the time of the argument of this case in this Court the counsel for all parties were agreed that an accurate knowledge of the testimony and the records would not justify a finding of laches or estoppel; and your petitioners submit that in view of this fact the finding of laches or estoppel made by this Court should not be made final, at leastuntil after this Court has heard argument touching the point of laches or estoppel, and for that purpose a reargument should be ordered by this Court.

Appellant's counsel disclaimed before this Court the existence of grounds for the finding of laches or estoppel.

Upon the argument of Mr. Rives for the appellant before this Court on the 25th day of February, 1902, one of the learned Justices was understood to ask him whether there was laches or estoppel in the case, and he was understood to reply that he knew

of no grounds therefor. Upon the argument of the appellees' counsel on the following day, Mr. Justice Brewer called the attention of appellees' counsel to the fact that the bill alleged that the construction of the dam had been commenced some two years before the filing of the bill, and asked whether in his opinion that bore at all on the complainants' right to equitable relief. To this the counsel for the appellees replied, Mr. Rives being present, that in his opinion the allegation referred to had no bearing on the right to equitable relief, and that the City set up no such claim. Said counsel then referred to the fact that during the said two years negotiations had been carried on between the parties, and for the character of these negotiations referred the learned Justice to the testimony in the record. That testimony we submit seems to have been overlooked or misunderstood by this Court.

Shortly after the question of Mr. Justice Brewer, the appellees' counsel concluded his argument. Mr. Rives replied at length but notwithstanding the suggestion of Mr. Justice Brewer, Mr. Rives set up no claim to laches or estoppel as in truth, in equity and good faith, the petitioners submit he could not.

The appellees have not been heard on the point of laches or estoppel.

Your petitioners submit that the Court is in error when, after a consideration of the cases referred to by it in its opinion, it says: "*It is, however, urged* "*that in all the cases referred to* the one party could "have appropriated the property or right of the "other by condemnation proceedings, and that as "he could have done so he should not be disturbed "for lack of those proceedings," &c., &c. (see opinion, p. 9).

Your petitioners submit that no such view was urged upon this Court; that the cases referred to were not mentioned in the brief of either counsel, nor referred to in the argument of the case before

this Court. This reference in the opinion of the Court to a discussion of these cases when no such discussion was had by counsel leads petitioners to believe that the Court has by inadvertence decided the case under the impression that argument had been heard upon a point which, in fact, had not been argued, and that cases had been discussed by counsel concerning which they have had no opportunity to be heard.

Petitioners submit that it is the function of counsel, through their pleadings, to frame or develop the issues for the decision of the Court. In our judicial system counsel are, like judges, officers of the court, and have rights and functions as well defined and as sacred as those which mark the judicial office.

Your petitioners submit that this Court, and all courts, are without power to decide an issue of fact that is not presented or developed by the pleadings, or an issue of law that is extraneous to the case as presented and delimited by counsel.

The limitation on the Court in this respect is the same as that which would preclude the court from taking jurisdiction of a mere controversy which was not brought into court and reduced to justiciable form. In both cases the judgment of the Court would be null and void, for it would be without jurisdiction.

Your petitioners do not mean to suggest that the Court may not discover, and of its own motion consider an issue in a case which counsel have overlooked, but your petitioners do assert that a court cannot properly pass upon such an issue until after it has ordered an argument thereon by counsel, or at least the submission of a brief. Otherwise we submit it would adjudge rights without having heard the parties.

It is conceded that laches or estoppel were referred to by appellees' counsel in his argument before this Court, but only when he commented on the case as free therefrom, once when he referred to the City's

answer and once again when he answered the question of Mr. Justice Brewer.

Reference to the absence of laches or estoppel there was, but no argument was made by appellees' counsel on the point of laches or estoppel for it was considered by him as he supposed it was conceded by the City's counsel that no ground existed therefor.

Counsel conceive now that the question of Mr. Justice Brewer as to the bearing of the allegation in the bill of the "two years," was asked by him under the impression that the cause of action and the decree of the United States Circuit Court all related to the construction and maintenance of the dam as unlawful and as creating the cause of action; but counsel submit that the question of the learned Justice was answered in accordance with the fact that the cause of action and the decree related only to the use of that structure for an unlawful purpose. In the latter aspect of the case, the fact that the construction of the dam was begun two years before diversion was threatened would, as appellees' counsel stated, have no bearing upon the right of the complainants to equitable relief. Complainants could not complain of the dam. What they could and did complain of was threatened unlawful diversion long before diversion was actually committed. So it appears from the bill, which alleges: "Your orators further aver that the defend-
" ant began about two years ago the building of a
" dam across the said west branch of said Byram
" River, about 500 feet north of the Connecticut
" line, and is now building said dam, and it is now
" near completion, and your orators *are informed*
" *and believe* that the said defendant *intends to di-*
" *vert* or cause to be diverted the water of said west
" branch or some of it, &c., &c."

The City, in its answer avers "that the *said dam*
" *is not completed*, or *near completion*, and will not
" prevent the natural flow of the said west branch
" of the Byram River for at least one year. It ad-

" mits that it *intends to divert* some or *all* of the " water of said west branch from its natural chan- " nel."

THE PETITIONERS NOW RESPECTFULLY SUBMIT THAT THERE IS NOTHING IN THE RECORD IN THIS CASE TO SUSTAIN THE FINDING OF LACHES OR ESTOPPEL, BUT THAT THIS COURT FOR THE REASON OF THE ABSENCE OF BRIEF AND ARGUMENT ON THE POINT INVOLVED HAS OVERLOOKED OR MISUNDERSTOOD THE EVIDENCE TOUCHING THE POINT OF LACHES AND ESTOPPEL IN THE LONG RECORD OF 238 PAGES, AND FOR THE SAME REASON HAS OVERLOOKED CERTAIN FUNDAMENTAL CONSIDERATIONS IN THE CASE TOUCHING THE SAME POINT, ALL OF WHICH COUNSEL DESIRE TO BRING BY BRIEF AND ARGUMENT TO THE ATTENTION OF THE COURT, TO THE END THAT THE DUE AND USUAL HEARING MAY BE HAD THEREON BEFORE THIS CASE SHALL BE FINALLY DECIDED.

The cause of action and the scope of the decree and injunction and the testimony are such as to exclude the laches or estoppel.

It is true that the bill prayed, in addition to the prayer that the City be restrained from diverting the stream, that the City be enjoined from completing the dam and maintaining it; but the cause of action and the *gravamen* of the bill were not the building of the dam, but the unlawful use of the same after it was built, for the purpose of unlawful diversion (*i. e.*, diversion at such times and to the extent that it would result, according to the common law, in depriving these complainants of their property—sensible, substantial diversion).

The decree of Judge Shipman in the United States Circuit Court and the injunction in effect recognized the dam in itself as a lawful structure, as the complainants concede it to be. The decree was obviously framed by the learned Judge with care to this

effect. The injunction and the decree did not order the removal of the dam or interfere with it in any way, except to forbid its unlawful use to deprive the complainants of their property, that is, it forbade unlawful diversion only, but left the City free, as in the nature of things and by the law it was free to take to any extent not amounting to technical diversion, *i. e.*, not sensibly and substantially diminishing the usual flow over the lands of the complainants and thereby depriving them of their property. The taking of flood waters would not necessarily be common law diversion and would not necessarily create a cause of action.

It is in evidence that the flow in the Byram River in the flood season is very great (sometimes sixty times as great), as compared with that of the dry season (see Complainants' Exhibit, Record, p. 193). The use of the water to a large extent in the flood season would not reach that point which the law regards as diversion and as creating a cause of action. But the testimony shows that the City intended to divert at all times, even in the dry season (see Record, fol. 164). That is the unlawful act complained of and the unlawful act which Judge Shipman enjoined.

In this connection the petitioners submit that it would seem that the Court has overlooked testimony supporting this view of the cause of action as taken by the complainants and by *the defendant* in their pleadings. Such is the testimony *introduced by the City*, at folios 407, 427, that there was no diversion until 1897, a year after the bill was filed. Testimony of a similar nature is given by the complainant Muller (fol. 349), and by the complainants' witness Johnson (fols. 344 and 372).

There are allegations by the City in its pleading, and there is testimony in the case of the complainants which negative the conclusion that the structure as a dam was notice that its purpose was unlawful diversion. Thus, the City alleges in its answer as follows: "Many years ago it (the City) took

" proceedings to acquire title to large quantities of " land in the County of Westchester to be used in " connection with the supply of water for the City " of New York, and it proceeded to construct, *and* " *is still constructing numerous dams*, aqueducts, " reservoirs and other structures necessary for the " said supply of water, and has expended upwards " of thirty millions of dollars in providing for said " water supply for the residents of the City of New " York. It admits that, among other things, it is " building a dam across the west branch of the " Byram River in the State of New York, and a " short distance from the boundary line between " that State and the State of Connecticut, but it " avers that the said dam is not completed nor near " completion and will not prevent the natural flow " of said west branch of the Byram River for at " least one year."

It is, therefore, conclusively proved by the City's own assertion that for many years the operations of the City in the immediate neighborhood, and near the boundary line, had been of a very extensive character, covering a number of dams and other structures to which, so long as they were put to a lawful use or to a use not affecting the rights and property of complainants, they could not and did not object.

It is in evidence that among these structures was another dam close to the dam in question, on the same river, a few miles above, at the outlet of Byram Lake, of which the City acquired the ownership in 1884, and which, from that time on, it had owned; but that while this dam had been owned by the City since 1884 as it had owned other structures in connection with its water supply, it had never been used for unlawful diversion, as was to be the case with the dam in question. The testimony of the witnesses Birdsall, Johnson and Vail conclusively proves this point. (See fols. 140, 155, 157, 160, 162, 165, 166, 369, 381 and 547.)

Petitioners therefore submit that any conclusion

that the dam was in itself notice to complainants of intended unlawful diversion is shown to be contrary to allegations in the City's pleading and negatived by the testimony.

The testimony as to the negotiations does not warrant the inference that petitioners had in any way consented to the taking of their property but were merely negotiating as to damages.

The petitioners show that the Court in its opinion states as follows: "It is true, the testimony discloses "that the plaintiffs and the City had been trying to "agree upon the amount of compensation, but that "shows that the plaintiffs were seeking compensa- "tion for the injuries they would sustain and were "not insisting upon an alleged right to an abandon- "ment of the work."

We submit that the testimony does not show that the plaintiffs were seeking compensation for the injuries they would sustain; that the testimony shows that the negotiations *prior to the filing* of the bill were strictly and avowedly as to at what price, if any, the complainants would consent to sell their property, and were conducted with notice to the City and a fair understanding by it that the plaintiffs and their counsel claimed that there was no way in which the City could condemn the property and take the water, and that eventually the United States Courts would enjoin the City from taking it until it paid their price.

All the statements made in the minutes of the conference, from which it could be inferred that the plaintiffs were seeking compensation in the way of *damages* and would deal with the City in any way of *compromise* were made at the date of the conference (April 28, 1897), over a year after the filing of the bill; relate entirely to the time at which they were

made (*i. e.*, a year after the bill was filed) and were made under the stipulation appearing in the record (at fol. 76), that any statements made would be regarded as made in an effort to arrive at a settlement without litigation and would not be used against complainants in the event of litigation.

There is further testimony to which the attention of the Court should be called. Prior to the filing of the bill the City had made no effort to settle with the complainants (fol. 84).

While an analysis of the testimony on the point of these negotiations is more properly left until the rehearing which it is prayed that this Court will grant, yet, in view of the circumstances it may be well to point out the precise character of the testimony in respect to the alleged negotiations. All the testimony on this point is contained in folios 70 to 114 of the Record, in minutes of the conference already referred to. This was a conference held April 28, 1897, between Commissioner of Public Works Collis, Chief Engineer George W. Birdsall, for the City, and Stephen G. Williams for the Byram River property owners. Two points must be considered. First, the negotiations before the filing of the bill (if the proceedings which took place prior to the filing of the bill between the parties to the suit can be called negotiations); and, secondly, negotiations or proceedings between the parties after the filing of the bill. It is submitted, that the character of all discussions and transactions between the parties after the filing of the bill cannot affect the question of laches or estoppel in this case, for the bill was filed, the "*lis pendens*" was of record and everything that passed between the parties to the action thereafter was subject thereto, and the complainants' rights were fully protected thereby. The bill repudiated the idea of damages and demanded injunction as the complainants' absolute right. The minutes of the conference indicate clearly the character of the pro-

ceedings, or so-called negotiations, between the parties prior to the filing of the bill.

The following is the statement given by Mr. Williams on the 28th of April, 1897, at the conference about a year after the filing of the bill, as to the nature of what had transpired between the parties to the controversy before the filing of the bill: "No "effort had been made on the part of the City to "make any settlement with any of the property "owners whom I represent. The City has deliber- "ately attempted to take property belonging to my "clients, who are citizens of another State and "whose property is in another State. I have made "in behalf of my clients, as Mr. Birdsall knows, and "will, I am sure, corroborate me, a number of "efforts *during the past two years or more* to obtain "a settlement of some kind with the City, apd I have "repeatedly stated to Mr. Birdsall, to the Corpora- "tion Counsel, and endeavored several times to make "the statement to General Collis but never could "get hold of him; that I was endeavoring to persuade "my clients to accept something like a reasonable "sum urging upon them the fact that it was more or "less a necessity for the City although the City could "have taken the water from some other place, but "that if the City were approached in a fair way it "would deal liberally with them; that there was no "way in which the City could condemn the prop- "erty and take the water, and that eventually the "United States Courts would enjoin the City from "taking it until they paid or settled in some way. "And it was not until I found my patience ex- "hausted that I was prepared to advise them, or "any of them, to begin their action for injunction."

This is the entire testimony covering the nature of what passed between the City and the complainants prior to the filing of the bill. Mr. Williams' expression is, "during the past two years or more." The period of two years would antedate the filing of the bill by about a year. But Mr. Williams goes further than that and says, "during the past two

years or more," and it is submitted, in any spirit of fairness this expression carries the testimony back to the inception of the controversy.

This testimony is clear and precise to the effect that the City had made no efforts to settle with or buy the rights and property of the complainants, and this in the face of unqualified statements made by the complainants' solicitor to the City officials of the absolute nature of their rights and of their unqualified intention to enforce those rights if the City used the claim for diversion without acquiring complainants' rights. Everything else that passed between the complainants' solicitor and the City officials at this interview, in which a settlement between the parties is discussed or wherein the situation between them is referred to as involving a question of damages or compensation as distinguished from price, is said after the filing of the bill and relates only to a period after the filing of the bill; and furthermore, was protected by an express stipulation made by Mr. Williams and expressly assented to by the City officials (fol. 76), that any statement made by him at the conference would be regarded as made in an effort to arrive at a settlement without litigation and would not be used against his clients in the event of litigation. The title of this document comprising the minutes of the conference, to wit: "Minutes of a conference in the matter of "claims by owners of property on the Byram River, "in the State of Connecticut for damages, &c.," must necessarily be limited to the period after the filing of the bill, that is, to the date of the minutes, which is stated in direct connection with its title on page 24 of the Record, April 28, 1897, over a year *after* the filing of the bill.

IT IS, THEREFORE, CLEAR THAT THE COMPLAINANTS FILED THEIR BILL ONE YEAR BEFORE THERE WAS ANY DIVERSION, PRAYING FOR AN INJUNCTION UPON THE GROUNDS OF FEAR AND APPREHENSION; THAT FOR THE TWO YEARS BEFORE THE FILING OF THE BILL THE CITY HAD BEEN FORMALLY AND REPEATEDLY

ADVISED OF THE COMPLAINANTS' RIGHTS, AND OF THEIR INTENDED RECOURSE TO THE FEDERAL COURT FOR AN INJUNCTION IF THE CITY DIVERTED; THAT THE CITY HAD REFRAINED FROM EVERY EFFORT TO SETTLE; THAT NOTHING WAS EVER SAID BETWEEN THE PARTIES TO THE CONTROVERSY IN RESPECT TO A SETTLEMENT FOR DAMAGES UNTIL AFTER THE BILL WAS FILED, AND THEN UNDER A SOLEMN STIPULATION THAT THEIR CONSIDERATION OR DISCUSSION OF DAMAGES SHOULD NOT BE TAKEN AGAINST THEM IN THE EVENT OF LITIGATION. IN A WORD, THE PARTIES HAD STATED, AND AS IT WERE, AGREED, UPON THEIR ISSUES OR DIFFERENCES, AND THE COMPLAINANTS HAD FILED THEIR BILL A YEAR BEFORE THEIR RIGHTS WERE ACTUALLY INVADED. CAN IT BE THAT THEREBY THEY HAVE LOST THEIR RIGHTS BECAUSE OF LACHES?

We submit that the following statements in the Court's Opinion are not supported by the record and the testimony.

At page 4 of the printed opinion, the following statement is made by the Court:

"If the plaintiffs had intended to insist on the "strict legal rights, which, for the purposes of this "case we assume they possessed, they should have "commenced at once and before the City had gone "to expense, *to restrain any work by it.* It would "be inequitable to *permit them to carry on negotia-"tions with a view to compensation* until *the City "had gone to such great expense* and then failing to "agree upon the compensation, fall back upon the "*alleged absolute right to prevent the work.* If "they had intended to rest upon such right and had "commenced proceedings at once, the City might "have concluded *to abandon the proposed under-"taking* and seek its water supply in some other "direction. If this injunction is permitted to stand, "the City must pay whatever the plaintiffs see fit

"to demand however extortionate their demand "may be or else *abandon the work and lose the* "*money it has expended.*"

The complainants could not properly be said to seek *to restrain any work* by the City, nor was it within the scope of the decree and injunction to do so.

The evidence shows that *no* "negotiations with a view to compensation" were carried on until after the bill had been filed, when no inequitable result could flow therefrom, as the bill disclosed the claimants' position, and that the negotiations (if they may be called so) before the bill was filed were not on the theory of reasonable compensation or settlement, but were of price or sale, and therefore could not have misled the City.

There is no testimony in the record showing that "the City had gone to such great expense." The City avers that at this time the dam was not near completion. The testimony shows that the Twenty-third and Twenty-fourth Wards of New York are supplied with water from four sources (see Record, fols. 542-546). The large amounts expended by the City were not expended exclusively at the Byram River dam, but on the City aqueducts, &c., through which other waters than those of the Byram River could be and is conducted, to wit, the waters of Kensico Lake, Bronx River and Rye Lake (see Record, fol. 143; fols. 542-546).

The complainants had *not* "alleged absolute right "to prevent the work."

There was *no necessity* in the event of an injunction that the City should "abandon the proposed undertaking" and there is *no proof* that abandonment would be necessary.

There is *no testimony* to sustain the view that the City, in the event of failure to buy from the plaintiffs, must "abandon the work and lose the "money it had expended."

On page 5, the Court quotes from the opinion of

Circuit Judge Shipman a proposition of law laid down by him and then says:

" However true that proposition may be generally " when invoked *at the inception and before any* " *work has been done*, we think it not applicable " when the plaintiffs *have waited until the work has* " *been progressing for two years and the defendant* " *has expended a large sum of money thereon.*"

But the cause of action was common law diversion and not the construction of the dam, and further there was no testimony in the case showing that a large sum of money had been expended on construction at the time the bill was filed.

Similar considerations apply to the reference on page 11 to the " conditions which exist after de- " fendant has proceeded *in the completion* of its " proposed work and *has expended a large sum of* " *money therein.*"

On page 2 of the opinion the Court states:

" *It also appeared that several thousand people in* " *the City of New York were dependent upon this* " *water supply.*"

The only testimony on the point referred to is contained in folios 542–546 of the record, and that testimony is to the effect that the Twenty-third and Twenty-fourth Wards of the City of New York are dependent upon a supply of water from four sources, known as the Kensico, Bronx, Byram and Rye supplies, to which the Byram supply contributes only about seven-twentieths.

This being the case, it can hardly be said that several thousand people are *dependent* on the Byram River supply.

We submit to the Court whether the authorities cited sustain the conclusions arrived at.

This case is an interstate case. All the cases cited by the Court are State cases, as distinguished from interstate cases.

In this case there had been neither prior assent nor subsequent acquiescence on the part of the complainants; on the contrary, there was prior protest and subsequent contest, and both protest and contest *before* diversion. All the cases cited are cases of prior assent or subsequent acquiescence.

In this case the property taken was real estate in Connecticut; the aggressor was a corporation of New York. The taking was for a public purpose in New York as distinguished from a public purpose in Connecticut. In *every* case cited by this Court the property taken, the corporation-aggressor and the public purpose all belonged to and were located in one State. (Or the corporation was a Federal corporation, having within the State the status of a State public corporation.)

In this case the wrong done was the taking of property—real property—without due process of law, without even color of law or authority, without any right of eminent domain.

The cases cited by the Court are either damage cases, to wit, consequential injuries, or breach of contract, as distinguished from the wrongful taking of property; or are cases of the taking of property under eminent domain, under color of law, or in virtue, as the Court has expressed it, of some "ultimate right to do the act sought to be restrained."

In this case the defendant had been operating for many years in the neighborhood of the complainants with dams and other structures, some on this very river, with no resulting injury to complainants, so that the construction of another dam was not *per se* notice to complainants of an intent to divert all the water.

The cases cited by the Court are cases where the acts of the defendant were *per se* inconsistent with the rights claimed by the complainants, and therefore notice to them.

In this case the structure was obviously useful for purposes not injurious to complainants, and therefore was not *per se* notice that it was to be used for

purposes injurious to them. There can be no presumption that a structure having a lawful use is to be used for an unlawful purpose.

The cases cited by the Court are cases where the structure was obviously useful only for a purpose necessarily injurious to complainants.

In this case no grounds for laches or estoppel were pleaded, and the same were not urged in brief or argument. In all the cases cited by the Court the issue of laches or estoppel was presented by the pleading or urged in the briefs of counsel, or inhered in the very nature of the question presented.

Annexed hereto is a consideration of the cases cited by the Court, showing in some detail wherein they are inapplicable.

Petitioners further show that the Court in its opinion, at pages 9 and 10, refers to the case of *Pappenheim* vs. *Met. Elevated Railroad*, 128 N. Y., 436. This case was submitted in the brief of appellees' counsel in this Court as stating the law of New York, and showing that where, as in this case, the taking is without legal right or color of law, the injunction must issue without any condition or alternative provision that in lieu of the injunction the complainants should take damages. In other words, that in such a case there is an absolute right to the injunction which a court of equity cannot withhold. This Court in its opinion says: "It was "suggested in the Pappenheim case, *supra*, 'that "'in cases where the owner wishes to actually stop "'the further trespass, and *where the defendant* "'*has no legal right to acquire the property*, such "'condition would not be inserted, and the injunc-"'tion would issue upon the right of the owner "'being determined.'" This Court then makes the following statement: "But the ruling of *this* Court "has been to the contrary, at least, in cases where "there has been delay on the part of the plaintiff "in commencing suit." To sustain this assertion this Court cites two cases, and only two, to wit: *Osborne* vs. *Missouri Pacific Railway Company*,

147 U. S., 248; *McElroy* vs. *Kansas City*, 21 Fed. Rep., 257.

Petitioners submit that an examination of these cases does not show that this Court has ruled to the contrary of the statement of law in the Pappenheim case quoted above; but discloses that the facts in the Osborne and McElroy cases were such that they afforded no grounds for any such ruling by this Court, and are not applicable to the case at bar.

The statement of the law of the injunction absolute in the Pappenheim case limits its use expressly to cases where "the defendant has no legal right" to do the act complained of, *i. e.*, to cases where the injunction is sought in defense of a strict legal right in the complainant. But in the Osborne and McElroy cases the defendant had the legal right to do the act complained of, and the injunction was not in defense of a legal right but of a qualified and mere equitable right. In the Osborne and McElroy cases the cause of action was not the taking of property as it is in this case, but consequential injury, for which damages and damages only were ultimately the only remedy under the express provisions of the constitution of Missouri.

The Osborne case was a case of consequential injuries to property adjoining the right-of-way of a railroad. The McElroy case was a case of consequential injuries to property adjoining a street which the defendant, a municipality, was grading in a way injurious to complainant, as owner thereon. Both cases were Missouri cases. The Missouri constitution provided that private property should not be taken or *damaged* for public use without just compensation. In the Osborne case the statute of Missouri conferring upon the railroad the right of eminent domain was defective in omitting to provide a method for assessing damage to property by way of consequential injury. In the Osborne case the injunction was refused obviously because the cause of action was consequential injury, and dam-

ages the ultimate, and, it may be said, the only remedy.

In the McElroy case the injunction was granted, but made dependent on ascertainment and payment of damages Mr. Justice Brewer, writing the opinion, expressly limited the alternative or conditional injunction therein granted to cases where "the de- "fendant had an ultimate right to do the act sought "to be restrained." This is just the right which the defendant in the petitioners' case has not got.

Petitioners submit that the Osborne and McElroy cases are not in conflict with the rule expressed in the quotation from the Pappenheim case (*supra*); which rule is the rule of property law both in Connecticut and New York by an overwhelming line of judicial authority and precedent, and which as a rule of property these complainants, as land owners in Connecticut, have a constitutional right to have applied for their protection in this case.

See

Jackson *v.* Chew, 12 Wheaton, 153.
Burgess *v.* Seligman, 107 U. S., 20.
And Appellee's brief on hearing in this court, p. 47.

Moreover, the case at bar is unlike the cases cited in that it is not an ordinary equitable case to enforce an equitable right, but is a *case in equity* to enforce a *strict legal right*. It is sought to prevent the taking of property, to enforce the petitioners' constitutional guaranty. It is fundamental and elementary in riparian law that the equitable action for an injunction in a case of a diverted water course is an equitable action to enforce a strict legal right (see Spelling on Injunctions, Vol. 1, §§ 304, 305, 2d Ed.).

The Court, in its opinion in the Pyne case, page 3, says that it assumes, among other things, "that "the plaintiffs have a *legal* right to the natural "flow of the water through their farms in the "State of Connecticut, and *cannot be deprived* of "that right by and for the benefit of the City

"of New York by any legal proceedings either "in Connecticut or New York; and that a court of "equity at the instance of the plaintiffs, at the in- "ception and before any action had been taken by "the City of New York would have restrained all "interference with such natural flow of the water." This assumption is that the complainants had an absolute *legal* right; that the nature of that right was such that it was to be secured through an injunction suit in equity, but that owing to the laches of the complainants the injunction must be denied.

But it is fundamental in the law as expounded by this Court through its long history and as confirmed by repeated decisions and opinions of Justices now on this bench:

THAT WHEN AN INJUNCTION IS SOUGHT IN AID OF A LEGAL RIGHT THE COURT IS BOUND TO GRANT IT, AND LACHES IS NOT A BAR IF THE LEGAL RIGHT IS ESTABLISHED.

This Court said in Menendez *v.* Holt 128 U. S., 523:

"Mere delay or acquiescence *cannot* defeat the "remedy by injunction in support of the legal "right, unless it has been continued so long and "under such circumstances as to defeat the (legal) "right itself."

And in Saxlehner *v.* Eisner Co., 179 U. S., 40, and in Menendez *v.* Holt, *supra*, this Court cited and quoted from one of the leading English cases on this fundamental principle of law (Fullwood *v.* Fullwood, L. R. Chan. Div. IX., 176), the expression of which case is (by syllabus):

"When an injunction is sought in aid of a legal "right, the Court is bound to grant it if the legal "right is established. Therefore, mere lapse of "time will not be a bar to the granting of the in- "junction, unless it would be a bar to the legal "right."

Prof. Pomeroy in his Equity Jurisprudence, 2d Ed., Vol. II., § 817, says:

"The equitable remedy to which this *quasi* estoppel by acquiescence most frequently applies, is "that of injunction, preliminary or final, when "sought by a proprietor to restrain a defendant "from interference with easements, from committing nuisances, from trespass, or other like "acts in derogation of the plaintiff's proprietary "rights. This effect of delay is subject to the important limitation that it is properly confined to "claims for purely equitable remedies to which the "party has no strict legal right.

"Where an injunction is sought in support of a "strict *legal* right the party is entitled to it if his "legal right is established; mere delay and acquiescence will not therefore defeat the remedy unless it has continued so long as to defeat the right "itself."

Petitioners submit that this statement from Prof. Pomeroy's treatise should be considered in qualification of the quotation from his work made by this Court in its opinion, page 4.

Petitioners, therefore, submit that in its opinion in this case, the Court expressly assuming that this action in equity is for the protection of a strict legal right, then proceeds to apply the rule of laches in contradiction to the authorities and contrary to the express decisions of the Court

Counsel submit that the cases cited by the Court should be reconsidered on brief and argument of counsel, and applied to this case, if at all, only after the due and usual hearing.

Lastly, petitioners submit that the character or status of the City of New York as a corporation as to these complainants and their real property in Connecticut is that only of a private corporation. Whatever may be the rule as to estoppel, the doctrine of laches implies some duty or obligation on

the part of the person against whom it is applied. Between the citizens of a State and that State or a corporation to which that State has lent its power of eminent domain, such duty or obligation may exist; but between the citizens of one State and a corporation, whether public or private, of another State, if the use it serves is limited to the other State, no such duty or obligation exists.

Therefore, before the doctrine of laches can be applied in this case, it must be determined that the City of New York is as to these complainants and their property a public corporation. This the Court has not done. On the other hand, it appears that the Court proceeds upon the contrary assumption.

The Court assumes that the City of New York is in this case a private corporation, for in its opinion, at page 9, it says: "We start in this case with the "assumption that there was no power in the City "of New York, by any proceeding in the States of "New York or Connecticut, to acquire the right of "appropriating this water and thus depriving the "plaintiffs of its continued flow." But the Court then proceeds to apply the doctrine of laches, and this, too, upon the authority of cases where the corporation was a public corporation discharging a public use as to the property rights involved and possessed of an ultimate right to take those rights. This is true of all the cases cited by the Court, and especially of the Osborne and McElroy cases.

The power of eminent domain implies the ultimate power of the corporation to take, and it implies equally the ultimate obligation of the property owner to surrender for an award of damages. In the Pine case there is in the City no ultimate right to take, and therefore there is no ultimate obligation in the complainants to surrender for an award of damages. Where there is the ultimate right of eminent domain, delay or acquiescence on the part of the owner is often fatal to his qualified right of ownership, because of his ultimate obligation to surrender his property for an award of damages;

but where there is no right of eminent domain then the right of ownership is not qualified but absolute. There is no ultimate obligation. Delay is not fatal, and even acquiescence does not bar the equitable remedy unless so extended that the legal right itself is lost—as through fraud or the Statute of Limitations.

The point touching the status of the City of New York as to the complainants and their property is one not only of importance in this case, but of vast importance to the law of private property generally. If a corporation of one State, charged with a public use purely local to the State of its creation, is to be treated in any respect as having the status of a public corporation as to the citizens of another State and their property, then it must be true that citizens of the various States and their property are subject to an extraordinary burden of public uses, the existence of which has never been suggested until the decision in this case. Citizens of each State and their property, it has always been known, are subject to public uses as to Federal corporations and as to corporations of their own State, but beyond this they have never borne any burden nor sustained any obligation of public uses. And petitioners submit, that it would be an intolerable addition to the burden of citizens and of their property in respect to so-called public uses, if in addition to protecting themselves and their property from the public corporations of their own State, they should be obliged to watch the operations and defend their property rights against the aggressions of every corporation in the forty-six States of the Union which may be created by its particular State under some theory of public use therein. Every industrial corporation or trust created by a State to purvey to its citizens the necessaries of life in which it traffics would be as to the citizens of the other States, their property and their rights, a public corporation. Your petitioners submit that this Court cannot intend so to extend the doctrine of public

uses and the burdens of private property. It therefore becomes a matter of signal importance, not only to this case but to the law generally, that the defendant in this case shall be held to be a private corporation and the doctrine of laches limited accordingly.

And now because of the matters and things above stated the petitioners do respectfully pray the Honorable Justices of this Court to grant a rehearing in this case.

SAMUEL PINE,
FREDERICK MULLER,
Petitioners.

WHEELER H. PECKHAM,
CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Counsel.

NEW YORK, May 15, 1902.

Certificate.

The undersigned do certify that the foregoing petition for rehearing is made in good faith and not for purposes of delay, and that in our opinion said petition is well grounded in the law and in the evidence and record in the cause.

WHEELER H. PECKHAM,
CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Counsel.

APPENDIX.

A FURTHER CONSIDERATION OF THE CASES CITED BY THIS COURT IN ITS OPINION TOUCHING THE POINT OF LACHES OR ESTOPPEL.

Galliher *vs.* Cadwell, 145 U. S., 368:

This was a bill filed by Galliher to quiet title arising out of the Homestead Entry Laws. Here the land in question was within the neighborhood of the claimant Galliher. The entry of Cadwell was under color of law as to the property and as to the claimant, to wit: a patent from the United States. The only question was whether Galliher had an equity superior to the legal title of Cadwell. The Court held that whether she had or not the title of Cadwell having its inception under color of law, Galliher was estopped. At page 372 of the opinion Mr. Justice Brown says, in part, "They (the cases) proceed on "the assumption that the party to whom laches is "imputed has knowledge of his rights and an ample "opportunity to establish them in the proper forum; "that by reason of his delay the adverse party has "good reason to believe that the alleged rights are "worthless or have been abandoned."

In the case of Pine against the City the party to whom this Court has imputed laches brought suit a year before their rights were really invaded, on information and belief as to what the city intended to do, and the city knew that the alleged rights were not worthless, and knew they had never been abandoned.

Roberts *v.* Northern Pacific Railroad, 158 U. S., 1:

This was a bill by the railroad company to quiet title. The opinion was by Mr. Justice Shiras, who bases the case, certainly in part, upon the fact that

the railroad was for a public and national purpose and under the Federal law had the right of eminent domain and a public use and purpose, notwithstanding the fact that the law of Wisconsin, through which State the railroad ran, denied to the railroad, as such, a power of eminent domain and a public use and purpose (see Opinion, pp. 19 and 25).

The Court in its opinion limits the case as follows: "It is well settled that where a railroad company "*having the power of eminent domain*, &c., &c."

Penn Mutual Ins. Co. *vs.* The City of Austin, 168 U. S., 685:

This was in fact a case of breach of contract by the City of Austin, in Texas, acting under statutes of that State. On the theory that the statutes impaired the obligation of the contract the complainant asked for an injunction, which was refused. It is to be observed that the case being essentially one of breach of contract, damages in the theory of the law were the ordinary and effectual remedy. Whereas, in the case of Pine against New York damages are not the ordinary and effectual remedy, for the complainants seek the return of their real estate and by the law of Connecticut, where it lies, they are entitled to its return and to the remedy of the injunction therefore.

The Penn case is further distinguished from the Pine case in that the act of the City of Austin in the construction of competing water works was done under a statute of eminent domain—due process of law as to the rights and property affected—and *therefore* was done by the city in virtue of an ultimate right in the city to take the property and in virtue of an ultimate obligation on the complainants to accept damages.

Northern Pacific Railroad Company *v.* Smith, 171 U. S., 260:

The same considerations apply to this case as are expressed above in respect to the case of Roberts *v.*

Northern Pacific Railroad, on the authority of which it was decided.

Provolt *v.* Chicago R. I. & P. Railroad, 57 Mo., 256:

A quotation from the opinion of the Court in this case will show its inapplicability to the case at bar: "The plaintiff did not attempt to obstruct or in any-" wise impede the progress of the work. The plain " inference was that he waived his right for repay-" ment of his damage, and only intended to follow " his remedy on his judgment. His conduct surely " led the company (defendant) to believe such was " his purpose, and induced them to pursue a course " and expend large sums of money which otherwise " they would not have done. If plaintiff intended " to rely on his rights and make present payment a " condition precedent, he should have objected and " forbidden the company (defendant) to interfere or " to do any work on his land till the question of " damage was settled. But this he did not do."

In the case of Pine against New York, as already pointed out, the plaintiffs could not impede the progress of the work. Up to the time of the filing of their bill no trespass had been committed by the City in which they could acquiesce or the consequences of which they could waive. The dam under construction, like the other city dams in the vicinity, was lawful until it was put to an unlawful and unusual use. At that time, and at that time only, could the complainants complain, and then only did their right to an injunction arise. It is obvious that no Court could have enjoined the City from proceeding with the construction of a dam. Its right to do so was presumably as good as that of any riparian owner on the Byram River.

Furthermore, in the Pine case there could be no inference that the plaintiff waived his right for the prepayment of his damages, since the testimony shows that in all the time that elapsed prior to the filing of the bill the plain relation between him and

the City was that of vendor and vendee; that the right in the vendor to charge what he pleased was fully asserted by him, but it did not need assertion. The testimony is clear to the effect that the City never did offer the vendor his price, but has deliberately proceeded to put the dam to an unlawful purpose and to strip the complainants of their property.

Charleston Railway Company *v.* Hughes, 105 Ga., 1:

Petitioners deem it sufficient to submit that this case in the lengthy quotation made from it by the Court in its opinion, so far from being against your petitioners, is pointedly in their favor. Petitioners reprint here so much of the opinion of the Supreme Court of Georgia as is quoted by this Court in its opinion (p. 7) with the particular words therein underscored which make the Charleston case an authority for the contention of petitioners rather than for the conclusions of this Court. In a parallel column are counsels' comments on the passages underscored:

"When a railroad company, without warrant or authority, enters upon the land of another, it is as a general rule no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land *with the consent of the owner, or under license from him,* and the property thus taken possession of becomes such a necessary component part of its railroad that to sur-

In the Pine case there was no consent and no license, but prohibition and warning.

render its possession would interfere seriously with the interests of the company, the landowner, although entitled to compensation for his property, might by his conduct in allowing *the entry upon his land* and permitting the company to so use it as that it could not be abandoned without great prejudice to its rights, estop himself from asserting against the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law which *govern in all transactions of the character above referred* to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether the corporation be public or private. A railroad corporation, *being one charged by the law with the performance of certain duties to the public*, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line or rail-

In the Pine case there was no entry, no invasion of complainant's rights until one year after the bill was filed.

In the Pine case the City was not charged with any such duties. Public duties in New York are not public duties in Connecticut nor as to real estate there.

way, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to possession of land, *where the rights of individuals only are involved, are purely matters* of private concern. Controversies in which a *corporation charged with the duties incumbent upon carriers of passengers, freight and* mails in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, which is absolutely essential to its complete performance *of the public duties required of it,* become matters of more than private concern, and in which the public is deeply and seriously interested. *For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another* in reference to the possession of land *will not be allowed to one* who is seeking to *recover such property from a railroad com-*

In the Pine case it is only the rights of individuals, that is, private parties, that are involved. Hence the controversy is one purely of private concern.

In the Pine case no public duties existed.

In the Pine case exact justice can not be done save by granting the injunction, nor can substantially the same rights be secured. The complainants demand their property and their right to it is a constitutional right.

pany, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure *substantially the same rights*, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy. That a railroad corporation has a right to deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land and constructs its road without lawful authority, and the *landowner acquiesces in* the wrongful act and the consequent appropriation of the property to a *great public use* until the same has become a necessary component part of the property required by the railroad to perform its *public duties*, such landowner will be held to have waived his right to retake the property, and will be re-

In the Pine case the owners did not acquiesce.

There were no public uses and no public duties.

mitted to such other remedies for the wrong done him as will not interfere with the *rights of the public* to have the railroad maintained and operated."

There were no rights of the public.

Atlanta, K. & N. R. Co. *v.* Barker, 105 Ga., 534:

Here the complainant had contracted with the Railroad Company to sell a right of way over his property, and had received part of the purchase money. Because the balance was not paid he sought ejectment. But the Court thought, in view of the contract, his remedy was an action for the balance. The case is placed entirely upon the fundamental or ultimate right of the Railroad Company to take the property for compensation (p. 538), and upon the prior assent and subsequent acquiescence of the landowner (p. 539).

Chicago, B. & Q. Railroad Company *v.* Ingelhart, 57 Neb., 444:

Here ejectment was refused because there was prior assent and subsequent acquiescence, and because the Railroad Company had the right of eminent domain and the status of a corporation charged with a use or purpose public as to the rights which it invaded.

Concerning the case of Osborne the only authority in this Court cited to sustain the proposition that the absolute, as distinguished from the alternative, injunction will be granted in those cases where the defendant has no legal right to acquire the property. (see Pappenheim's case, opinion, p. 10).

Osborne *v.* Missouri Pacific Railway, 147 U. S., 248:

This case is more fully discussed in the petition. It suffices to note here that Chief Justice Fuller in

treating the doctrine of laches or estoppel as applicable to this case, bases it upon the existence in the case of the power of eminent domain in the defendant. "*Whenever*," he says, "*the power of eminent* "*domain is* about to be exercised without compli- "ance with the conditions upon which the author- "ity for its exercise depends, courts of equity are "not curious in analyzing the grounds on which "they rest their interposition.

"*Equitable jurisdiction may be invoked in view* "*of the inadequacy of the legal remedy where the* "*injury is destructive or of a continuous character* "*or irreparable in its nature; and the appropriation* "*of private property to public use under color of* "*law, but in fact, without authority is such an in-* "*vasion of private rights as may be assumed to be* "*essentially irreparable, if indeed relief may not be* "*awarded, ex debito justitiæ.* But where there is "no direct taking of the estate itself in whole or in "part, and the injury complained of is the infliction "of damage in respect to the complete enjoyment "thereof, a court of equity must be satisfied that "the threatened damage is substantial and the "remedy at law in fact inadequate before restraint "will be laid upon the progress of a public work. "And if the case made discloses only a legal right "to recover damages rather than to demand com- "pensation, the Court will decline to interfere."

In the Pine case equitable jurisdiction is invoked, as the learned Chief Justice says it may be, because the injury is destructive, of a continuous nature and irreparable; because private property is taken, not for a public use, but for a private or foreign use, and under no color of law. There is a direct taking of the estate itself. The threatened damage is substantial, and the remedy at law is in fact inadequate as the Courts of Connecticut where lies the real estate taken, have declared, for the legal remedy does not restore the property.

The case of McElroy *v.* Kansas City, 21 Fed. Rep., 257, is considered in the petition (p.).